

No. 86-1543

Supreme Court, U.S.
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JOSEPH F. SPANIOLO, JR.
CLERK

(A)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PETERSON PAINTING, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

EDWARD R. LA CROIX, SR.
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel of Record

LA CROIX, SCHUMB,
SANGUINETTI & KELLER
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel for Petitioner



QUESTIONS PRESENTED

1. Are "make-whole" orders of the National Labor Relations Board issued after the expiration of the collective bargaining agreement in excess of the remedial authority conferred on the Board by Section 10(c) of the National Labor Relations Act in light of the recent decision of the Board in John Deklewa & Sons by which the Board radically altered the law applicable to this case?

2. Should the Supreme Court remand this matter to the Circuit Court of Appeals with directions to that court to further remand to the Board for modification of the decision in this case consistently with the Deklewa decision?



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ARGUMENT

1. Request of Limited Grant of Certiorari:

Consistently with Rule 22.6 and with counsel's continuing duty to inform the court of any developments which affect the outcome of a case, Fusari vs. Steinberg (1975), 419 U.S. 379, 391, petitioner is submitting this Supplemental Brief to seek a review of the case at bench in the light of the far reaching changes made in the applicable law by John Deklewa & Sons, 282 NLRB 184, 1986-87 CCH NLRB 18,549, decided on February 20, 1987. By this Supplemental Brief, petitioner is further requesting that this court grant the Writ of Certiorari on the limited basis of Deklewa and that as part of such limited grant of certiorari this court remand this case to the Circuit Court of Appeals with directions to that court to further



remand to the NLRB for redetermination of the issues and modification of the decision in the light of Deklewa. NLRB vs. Virginia Electric & Power Co., 314 U.S. 469 (1941); NLRB vs. Food Store Employees Union, 417 U.S. 1 (1974); Ace Beverage Co. vs. NLRB, 250 NLRB, page 646; 29 CFR 101.13(b). Thusly, this court will do (a) substantive justice by affording the Board and petitioner with the opportunity to cure what will otherwise be an economically disastrous error to petitioner and this court will (b) procedurally place this matter for redetermination before the Board where it should be.

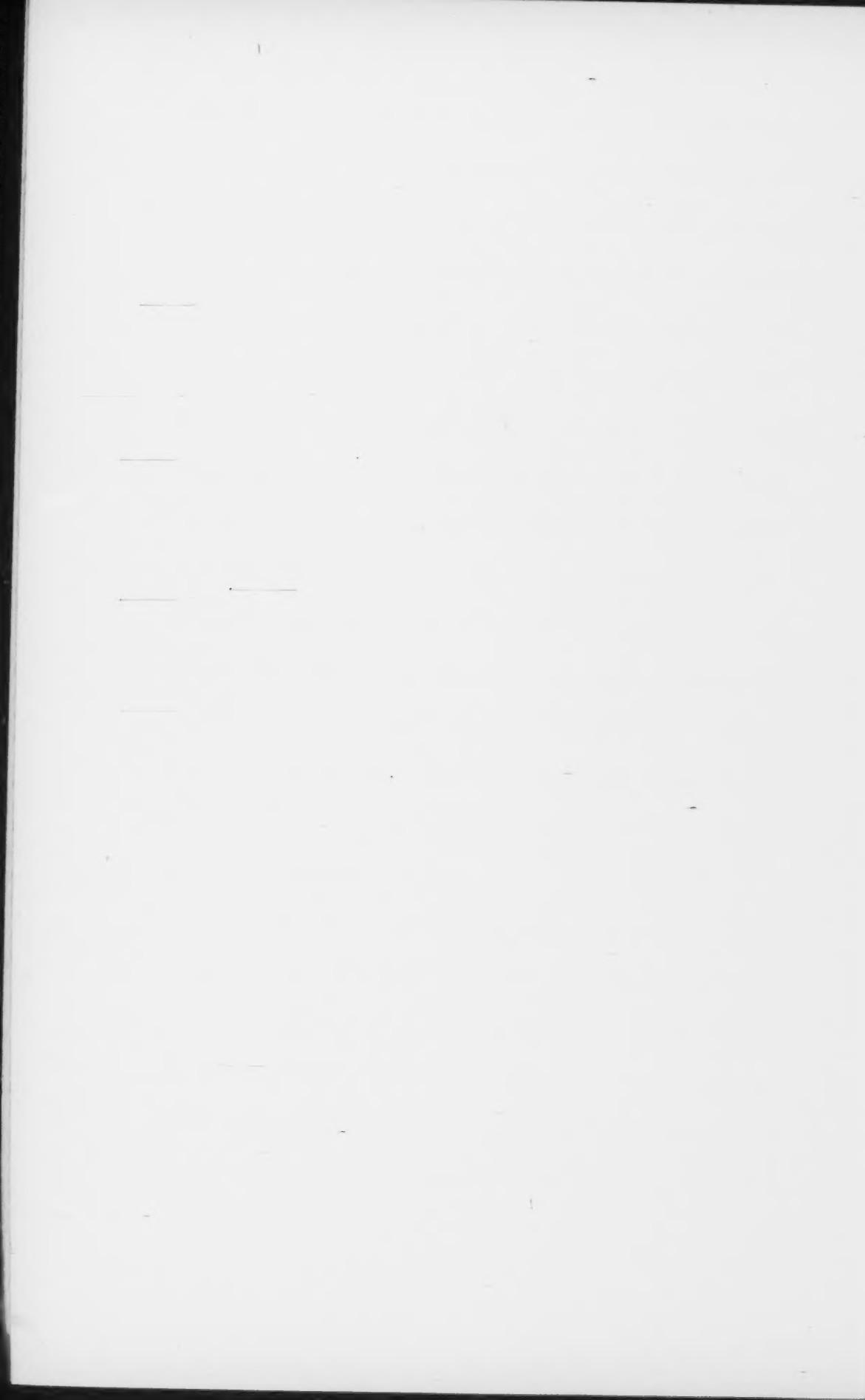
2. Substantial Effects of Deklewa:

The decision of the National Labor Relations Board in John Deklewa & Sons, 282 NLRB 184, is being hailed as the most important development on construction industry labor laws since the 1959



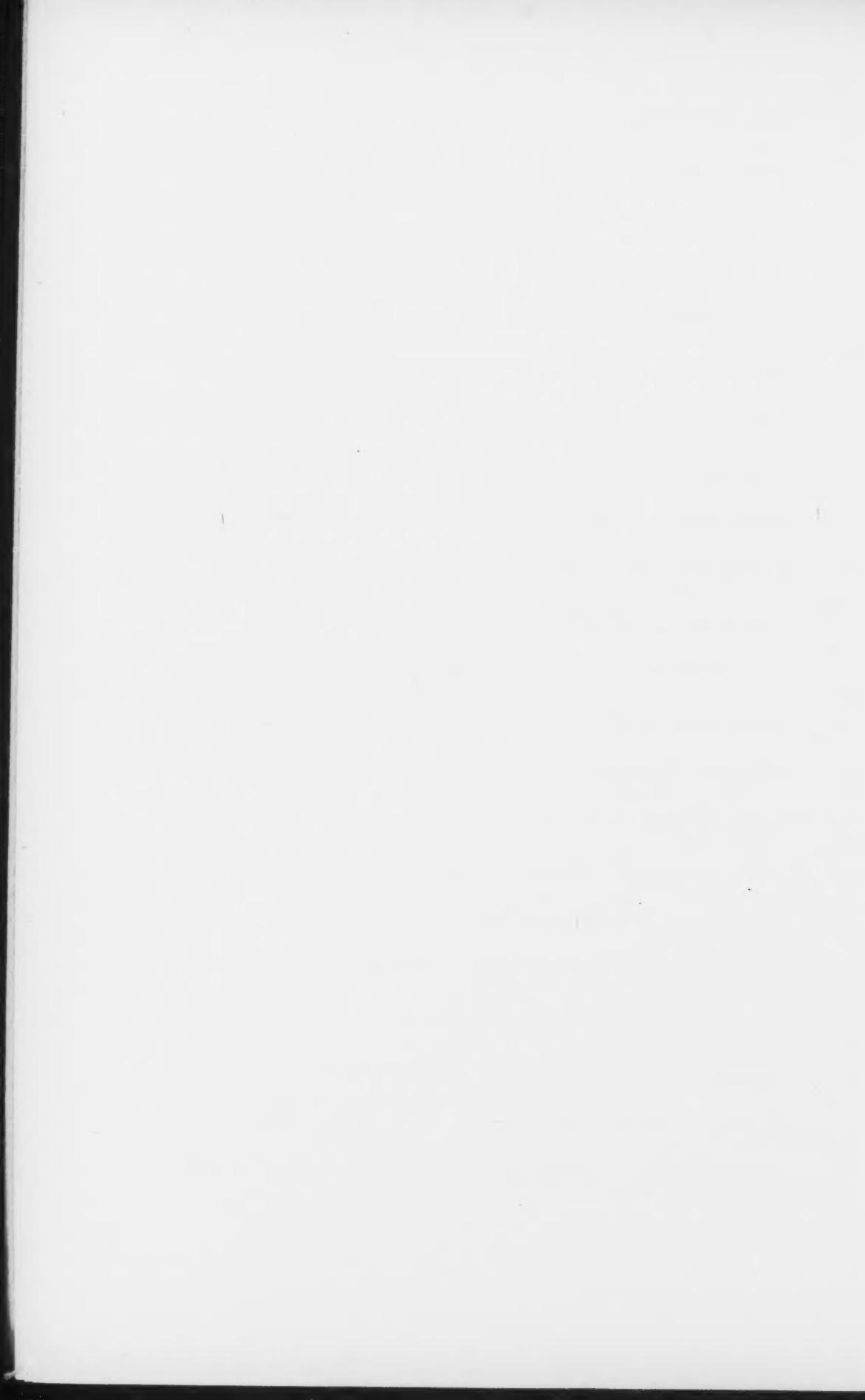
amendments to the National Labor Relations Act. Clearly, it is a decision which, by its own expression, radically alters the rules related to Section 8(f) of the Act and to pre-hire agreements. For purposes of the case at bench, Deklewa would completely change the results and decision in that Deklewa abolishes the presumption of majority status with respect to 8(f) agreements at termination of the collective bargaining agreement and it leaves no doubt that at such termination the obligations that have been imposed on the employer in this case are no longer permissible.

There is no disagreement over petitioner's compliance with and adherence to all terms of the collective bargaining agreement until its expiration on June 30, 1983. The issue in this case arises as to the obligation of petitioner to continue to bargain with



the union to impasse to avoid the "make-whole order" of the type made in this case.

The decision of the Board, as confirmed by the Circuit Court of Appeals, was predicated upon the employer's obligation to continue to negotiate to enter into a successor agreement or to impasse after the termination of the prehire agreement. Deklewa clearly rejects such an obligation as being one that was contemplated by the Act; in so doing, the Board emphatically states that after expiration of the contract the employer (a) would have been privileged to announce an intention not to bargain with the union for a new contract; (b) would have been privileged to withdraw recognition from the union and (c) would have been privileged to implement unilateral changes. On those same



grounds, the Board made impermissible the "make-whole" type of orders issued in Deklewa when extended beyond the expiration date of the contract. That prohibition is no less applicable to the case at bench. In short, the very reasons for punishing Peterson Painting Company in the case at bench are made permissible by Deklewa.

3. Deklewa Infuses Life Into Petitioner's Arguments in Favor of Employees' Rights:

In the Petition for Writ of Certiorari, petitioner advanced the position that employees were being deprived of rights under the due process and equal protection of the laws in not being allowed the freedom to express themselves on such issues as "an agency shop" and "closed or union shop." (Pet. 32-40). The Board in Deklewa rejected the previous interpretations of 8(f)

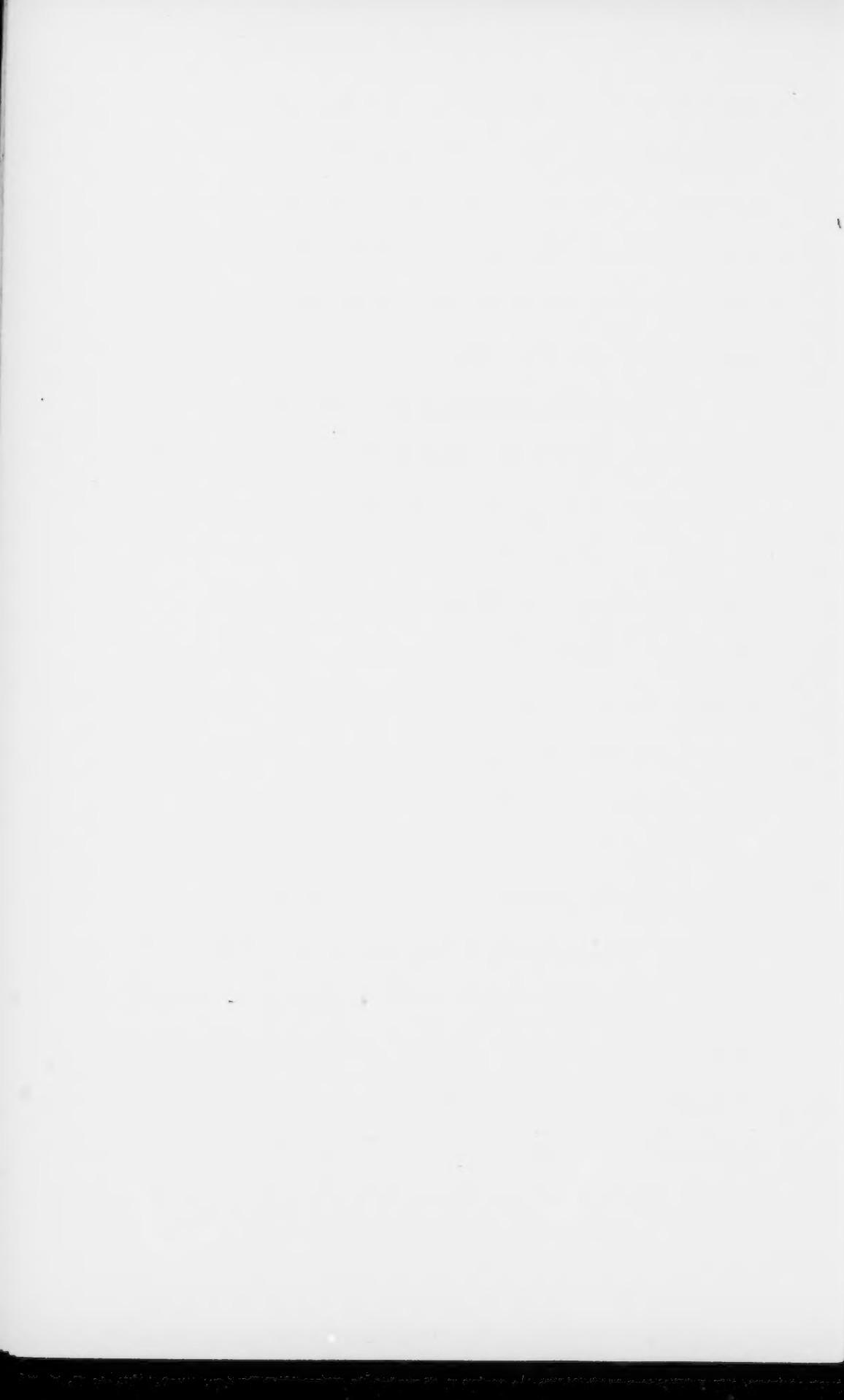


agreements, embodied in R. J. Smith Construction Co., 191 NCR 693, and its progeny, for its failure to effectuate the type of employee's free choice that had been intended by Congress in the enactment of the law.

4. Retroactivity of Deklewa:

In deciding Deklewa, the Board expressed itself at length on the public policy in favor of extending retroactivity as much as possible to all pending cases in whatever stages they might have been at the time of the decision in Deklewa in order to avoid the imposition of obligations born out of errors.

The decision of the Board in the case at bench was affirmed by the Circuit Court of Appeals prior to Deklewa; hence, the Board would argue that it lacks jurisdiction on the question of purported unfair practices while having continuing



jurisdiction on the enforcement of the order pursuant to 29 U.S.C.A. 160(e) and (f); 29 C.F.R. 101.13(b). In order to avoid the possible bar of any relief to petitioner on that basis, it is essential that this court remand the case to the Circuit Court of Appeals with directions to that court to further remand to the Board for modification of the decision consistently with the Deklewa case and with case law that defers discretion to modify Board decisions to that body.

NLRB vs. Food Store Employees Union
(1974), 417 U.S. 1; NLRB vs. Virginia
Electric & Power Co. (1941), 314 U.S.
469; International Union of Mine, Mill
and Smelter Workers vs. Eagle Pitcher
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Respectfully submitted,



EDWARD R. LA CROIX, SR.
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel of Record

LA CROIX, SCHUMB,
SANGUINETTI, KELLER &
SCHUMB
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel for Petitioner

June 4, 1987